Unto the Right Honourable the Lord Juſtice General, Lord Juſtice Clerk, and Lords Commiſſioners of Juſticiary;

THE PETITION OF

Sir JOHN GORDON of *Invergordon*, Baronet;

HUMBLY SHEWETH,

THAT upon the 28th *November* 1758, a petition and complaint was preſented to this court of ſeſſion by *John Mackenzie* of *Brae*, *Donald Moriſon* and *Alexander Mackenzie* of *Fairburn*, members of the town council of the burgh of *Dingwall*, in terms of the acts of parliament, the 2d and 16th of his late Majeſty, ſetting furth, that the election of magiſtrates and counſellors of *Dingwall*, for *Michaelmas* 1758, was brought about by bribery and other unlawful means practiſed by Colonel *John Scott*, then of the third regiment of guards, and his agents; and, therefore, praying the court to void the election made by the pretended majority, and to aſcertain the election of certain other perſons voted for by the complainers, or to give ſuch other relief or redreſs as the court ſhould think fit; and, particularly, to inflict a proper cenſure upon *Andrew Robertſon* the town clerk, for his various

various malverſations and partial proceedings in the courſe of ſaid election.

In the anſwers which were given in to this complaint, the defenders attempted rather to ridicule the charge of bribery and corruption brought againſt them, than ſeriouſly to deny the truth of it;—and, at the ſame time, inſinuated, that the like practices had been uſed by a certain perſon who had ſtood candidate, in oppoſition to Colonel *Scott*. By this means, the petitioner, who could be the only perſon aimed at by theſe reflections, was obliged to ſiſt himſelf in court.—He accordingly appeared by his council, and craved that a proof at large might be allowed to the defenders of theſe articles.

Hereupon, a proof at large was allowed to both parties, in the courſe of which, the whole ſcheme of Colonel *Scott*, and the illegal practices employed by him and his aſſociates, were fully laid open and aſcertained by the moſt ſatisfactory evidence.—It appeared, that Colonel *Scott* having declared himſelf a candidate to repreſent that diſtrict of burrows, of which *Dingwall* is one, and, having no natural intereſt in that burgh, was obliged to have recourſe to the groſſeſt bribery and corruption, in order to make up for that defect.—This had appeared particularly in the methods employed by him, to ſecure a choice of perſons proper for his purpoſe, into the magiſtracy, at the election of *Michaelmas* 1758, immediately before the complaint was brought.

It was proved, that large ſums of money were given by Colonel *Scott* himſelf, and his acknowledged agents, under expreſs ſtipulations of ſupporting the Colonel's intereſt, for the purpoſe of carrying the next general election in his favours. The perſons who gave and received the money, acknowledged it upon oath.—Bills, letters, and other written evidence of the fact were exhibited, tho' the principal part of the correſpondence on that ſubject, appeared, on the evidence, to have been wilfully ſuppreſſed and deſtroyed after

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the ſuit was brought.—It was further in evidence, that Colonel *Scott*, at different times, remitted to his agents and confidents, large ſums of money, particularly, a ſum of 500 *l.* to be employed in bribing the counſellors of *Dingwall;* and that thoſe agents acquainted the counſellors, of the money being remitted for the foreſaid purpoſe.—It was proved, that Baillie *Alexander Mackenzie* received 100 *l. Sterling* from Colonel *Scott* himſelf, pretended to be for the uſe of the community:—An annuity of 20 *l. Sterling*, for life, was ſettled upon Provoſt *Bain* of *Tulloch*, by obligation under Colonel *Scott*'s own hand:—30 *l.* was given to Miſs *Anne Bain*, his daughter, under whoſe influence he was, being an old blind man:—30 *l.* was given to *Alexander Cameron*, one of the counſellors; five guineas to his wife at one time, and one guinea on another occaſion, by Colonel *Scott* himſelf:—30 *l.* was given to *Donald Bain*, another of the counſellors; five guineas to his wife, and one guinea to his grand-daughter:—The ſum of 80 *l.* was ſeveral times offered to the complainer *Donald Moriſon*, and *Roderick Moriſon*, other two counſellors, who refuſed it with indignation.—The office of clerk of the juſtices of peace, was procured by Colonel *Scott*, for *Andrew Robertſon* town clerk, and one of the counſellors; and the expences of paſſing the commiſſion were paid by the Colonel.—Freehold qualifications, conſiſting of houſes in the town of *Dingwall*, and the expences of the rights and infeftments were beſtowed upon five perſons of the name of *Mackenzie*, who were all thereupon choſen counſellors of the burrow at *Michaelmas* 1758. Promiſes and offers of money were made to *John Robertſon* the dean of guild, by letters exhibited in proceſs, wrote by Colonel *Scott* himſelf, and the moſt undue and illegal means were proved to have been otherwiſe uſed, as charged in the complaint, for the purpoſes before mentioned.

It was further proved by the evidence of gentlemen of the greateſt credit and honour, and by the witneſſes the defenders

fenders themſelves examined, on purpoſe to prove their charge of recrimination, that Sir *John Gordon* had, on all occaſions, declared his abhorrence of bribery and corruption, and every undue practice in the conduct of this election: That this was generally known and believed, and that no attempt was made upon his part, to influence any perſon by indirect means.

Never, indeed, was any kind of criminal proceeding more clearly made out, than theſe acts of bribery and corruption were, againſt Colonel *Scott* and his aſſociates.—They had not even taken the ordinary precautions of all delinquents, of endeavouring to bury their offences in ſecrecy and concealment, or, at leaſt, out of decency, and an external regard to the laws of their country, of endeavouring to throw over them ſome ſlight diſguiſe.—Had bribery and corruption been the moſt meritorious actions, they could hardly have been gone about in a more open and publick manner.

Accordingly, upon adviſing this proof, and after hearing council for five ſucceſſive days, the Lords, by a moſt ſolemn judgment, and in a full bench, unanimouſly found, upon the 8th *Auguſt* 1759, the ſaid "complaint competent and "relevant, and found, that the election made at *Michael-*"*mas* 1758, by the perſons complained on, was brought "about by means of bribery and corruption, and, *there-*"*fore*, found the ſame void and null, and reduced, decern-"ed, and declared accordingly; but refuſed to declare the "perſons voted by the complainers, to be legally elected "magiſtrates of the ſaid burrow of *Dingwall;* and found "Colonel *John Scott*, *Kenneth Bain* of *Tulloch*, *Kenneth Mac-*"*kenzie*, and *Andrew Robertſon*, conjunctly and ſeverally, li-"able in the full coſts of ſuit."

Altho', by this judgment, the proceedings that were brought about by corrupt, and other illegal practices, were annulled, yet the mere voidance thereof, was by no means ſufficient

ſufficient to anſwer the purpoſes of the complainers, to put a check to bribery and corruption, a crime at once the moſt dangerous to the conſtitution, and the moſt pernicious to the morals of individuals, eſpecially, when employed, in order to procure a ſeat in parliament. To attain this publick end, it was thought neceſſary, that the full puniſhment of the law ſhould be inflicted upon perſons who had been proved guilty of practices condemned by it, in ſo eminent a a degree. With this view, a petition was given in to the court, 9th *Auguſt* 1759, craving the Lords to inflict the penalties of law upon Colonel *Scott*, and the other three perſons pointed out in the judgment of the Court of Seſſion, as having had the moſt active hand in the ſcene of bribery and corruption that was thereby found proven: And a doubt having thereafter ariſen, whether the court could proceed to do this upon a ſummary complaint? In order to remove that difficulty, a ſuppletory action of declarator was raiſed before the Court of Seſſion, to be conjoined with the former proceedings upon the ſummary complaint.

This action, to which his Majeſty's advocate gave his concourſe, was founded both upon the acts of the 2d and 16th of his late Majeſty, and upon common law. And after ſpecifying the various acts of bribery and corruption, which have already been found proven, the libel farther concluded, " That, for farther redreſs of the ſaid wrongs, " it ought and ſhould be found and declared, by decree of " the Lords of council and ſeſſion, that Colonel *Scott*, *Ken-* " *neth Mackenzie*, *Kenneth Bain* of *Tulloch*, *Andrew Robert-* " *ſon* the clerk, *Alexander Cameron*, *Donald Bain*, *William* " *Fraſer*, and *Thomas Mackenzie*, all of them actors and aſ- " ſociates in this ſcene of corruption, had thereby incurred " the penalties and diſabilities contained in the foreſaid act " of the 2d of his late Majeſty; or, at leaſt, upon the com- " mon law of the realm, they had, by their ſaid offences, " forfeited and loſt their right of burgeſs-ſhip, and ſhould

" be disabled from electing, or being elected into trust, of-
" fice, or franchise in the said borough; and that they
" should be fined in the sum of 500 *l. Sterling* each for their
" said offences, and otherwise punished for the sake of pub-
" lick example, and decreed to pay damages and costs of
" suit."

There were two objections chiefly insisted upon by Colonel *Scott* and the other defenders against this action. In the *first* place, it was urged, That an action, containing such severe conclusions, and insisting for high penalties, was not competent to be brought before the court of session. In the *second* place, they argued, That bribery was a *publick* crime, whereby no individual was particularly hurt; and consequently, that all prosecutions for such crime must be carried on at the *instance* of the King's advocate; *but* that no private party was intitled to prosecute for bribery at his own instance, with *concourse* only of the King's advocate.

After advising informations upon these two points, and hearing parties *in præsentia;* the Lords, upon the 13th *January* 1762, " Found the action not competent before this
" court; and therefore dismissed the same."

This judgment was affirmed in the House of Peers, 14th *March* 1763: By which, it was *ultimately* found and established, *that* the court of session was not competent for the trying of bribery, to the effect of punishing the guilty persons; and that, for that purpose, it was absolutely necessary to prosecute in the court of justiciary.

Your petitioner, Sir *John Gordon*, who had been obliged to sist himself as a party before the court of session, and who was indeed the person *chiefly* interested in the proceedings against Colonel *Scott* and his associates, thought it a duty which he owed to himself, to his friends, and to the publick, to follow out this matter in the only competent court, which was now found to be the court of justiciary.

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As this proceſs was the firſt that had ever been commenced and followed out with effect in this country, upon the laws againſt bribery, the petitioner eaſily ſaw, that the fate of it was likely to be conſidered as a *precedent* in *all* time coming.

Altho' the groſſeſt acts of bribery and corruption had been proven in the courſe of that proceſs, and altho' the proof thereof now ſtands upon record in the court of ſeſſion; yet, the perſons evidently pointed out as being guilty, had hitherto eſcaped with impunity. Even that *ſmall* ſum of money awarded againſt the defenders in the former proceſs before the court of ſeſſion, in name of coſts, (if that could have been with any propriety regarded as a penalty) remains *ſtill* unpaid; for tho' clearly decerned againſt them, yet the defenders, by very unuſual, but ſucceſsful efforts of litigation, have contrived to keep that money in their own pockets to this very day.

As every argument, therefore, that can well be imagined, the dangerous nature of the crime itſelf, the frequency of committing it, the open and undiſguiſed manner in which it was gone about in the preſent caſe, and the clearneſs of the proof, ſeemed all to demand an exemplary puniſhment, in order to diſcourage the like practices for the future. And as the great argument pleaded for the defenders at the bar of the Houſe of Peers, and upon which the judgment of that houſe, finding the court of ſeſſion not competent for inflicting the puniſhment, had proceeded, was, *that* the court of juſticiary was ſtill open, the petitioner had little reaſon to imagine, that any obſtruction from official powers could lie in the way of a proſecution being commenced before that court.

However, as bribery and corruption are crimes by which the publick itſelf is moſt directly injured, the petitioner was adviſed, that, by the practice and eſtabliſhed forms of criminal procedure in this country, the intended proſecution

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muſt be at *the inſtance* of the King's Advocate, as publick proſecutor, to render the trial effectual. With this view, ſo early as the month of *February* 1763, when the appeals were yet depending before the Houſe of Peers, the petitioner had applied to his Majeſty's Advocate, then at *London*, deſiring to know, "whether he would proſecute Colonel "*Scott* and the other offenders, at his inſtance, before the "court of juſticiary, or in what way he would give the aid "of his office in either of theſe caſes, *viz.* 1*mo*, The ap"peal's being withdrawn; or, 2*do*, The judgment of the "court of ſeſſion declining their own juriſdiction being af"firmed." The Lord Advocate thought this application *premature;* and therefore, cauſed notify to the petitioner, upon the 19th of the ſaid month of *February*, "That his "Lordſhip would moſt readily conſider the caſe, *after* the "Houſe of Lords had given judgment upon the appeals "now depending, and give his anſwer to any application "made to him as Lord Advocate, for a proſecution in ju"ſticiary; *but that* he could not, at preſent, take any reſo"lution, *as* no ſuch application is or can be made, *till* the "affair is determined by the Houſe of Peers."

The appeal having been heard, and the cauſe determined, the petitioner again applied to the King's Advocate upon the 22d *March*, and received an anſwer in the following words: "Lord Advocate, in anſwer to Sir *John Gordon*'s "note, ſays, that as *he does not act here* in the character of "Lord Advocate as to criminal trials, it will be proper for "Sir *John*, to do as in all other caſes, to lay the matter be"fore the Lord Advocate's deputies at *Edinburgh*, Mr. Soli"citor *Montgomery*, and Sir *David Dalrymple*, who will di"rectly give an anſwer as to the juſticiary trial; or, if "there is any difficulty, Lord Advocate, who will be ſoon "in *Scotland*, will adviſe with them as to the mode of trial, "*&c.*"

The Lord Advocate having ſoon after come to *Scotland*, Mr. *John Hay* writer in *Edinburgh*, in conſequence of a ſpecial

cial mandate from your petitioner, preſented to his Lordſhip a repreſentation and information, ſigned by him, of date the 14th *April* 1763, ſetting furth, " That, in conſe-
" quence of the late deciſion in the Houſe of Peers, there
" remained no way of obtaining juſtice againſt bribers, but
" a criminal proſecution in the juſticiary: That Sir *John*
" *Gordon* had an intereſt to inſiſt in ſuch a proſecution a-
" gainſt Colonel *Scott* and others, both as a perſon who had
" been groſsly aſperſed, and as having likewiſe been injured in the conſequences of the election: That he was
" likewiſe intitled to take notice of ſuch practices, as a ju-
" ſtice of the peace in the country where they were com-
" mitted: That he therefore thought himſelf called upon
" by the juſtice he owed to himſelf, and the due regard he
" had to the honour and ſecurity of government, to the
" publick good and ſafety of the conſtitution, to make that
" repreſentation to his Majeſty's Advocate, praying that he
" would give the *moſt effectual aid* of his office for obtaining
" publick juſtice, as well as ſatisfaction and reparation to
" the parties injured; and *therefore, deſiring not only his con-*
" *courſe or concurrence* to a proſecution in the court of juſti-
" ciary, to be raiſed by Sir *John* (*i. e.* your petitioner) againſt
" Colonel *Scott*, *Kenneth Mackenzie*, *Donald Bain*, and *Alex-*
" *ander Cameron*, or any other of the principal offenders the
" Advocate thought proper, ſo as not to deprive the proſe-
" cutors of *neceſſary evidence*, *but alſo* his inſtance, to the
" end the ſame may be purſued for his Majeſty's intereſt,
" for the purpoſe of avoiding expence and delays calculated
" to defeat and obſtruct *the courſe* of *publick* juſtice."

The Lord Advocate returned this information ſome weeks after, with an anſwer wrote on the back of it in the following words: " *I will not proſtitute my office* to ſerve the
" purpoſe of *private* reſentment. When the criminal libel
" was brought in the court of ſeſſion, *recently* after the
" crime was committed, the purſuers, *by advice of their*

" *council*, aſked no more than the concourſe of the King's " Advocate for the time, *that* being ſufficient for *all* the " purpoſes of *private* and *publick* reparation: At *this* di- " ſtance of time, *I will not* adopt the action at my own in- " ſtance. I will give my concourſe to any criminal libel " brought *by a party* having intereſt to purſue."

The petitioner muſt own, he was not a little ſurpriſed, both at the ſtile and the matter of this anſwer. He apprehends, that it belongs not to his majeſty's advocate to examine into the breaſts of private parties, provided the application made to him, was regular and proper. The petitioner, with all deference, muſt contend, that it was the *duty* of his office to comply therewith, from whatever motive that application might proceed. To exclude reſentment from criminal proſecutions, would, in effect, be putting a ſtop to them altogether. The petitioner does indeed feel reſentment at the *multiplied ill* uſage he has met with from Colonel *Scott* and his aſſociates; but ſtill more at the dangerous and illegal practices carried on by them publickly and avowedly in the face of the world, and in open violation of the moſt ſacred and fundamental laws of their country. It is *not pretended*, that he has ever ſought to gratify this reſentment by any dark or inſidious practices: His *only aim* has been to bring the offenders to a fair and an open trial, that there they may either clear themſelves of what is laid to their charge, or ſuffer the penalties the law has appointed; and when this is the caſe, ſo long as reſentment is *thus confined* within proper bounds, and *only* directed againſt what the law of the country condemns, he apprehends, it is a paſſion which the laws of GOD and of man have allowed, and in which no perſon on earth need eſteem it a proſtitution of his office, to bear him company.

The diſtance of time, which is alſo mentioned in the Lord Advocate's anſwer, as a reaſon for refuſing to purſue at his inſtance, muſt certainly have been put in there, for

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reaſons your petitioner cannot comprehend. So long as the proceedings were going on before the court of ſeſſion, upon ſummary complaint, and the ſuppletory action of declarator, and during the whole time that the appeals were depending before the Houſe of Lords, it would have been abſurd to have inſiſted for a trial before the court of juſticiary; and ſo ſenſible was the Lord Advocate himſelf of this, that when applied to on the 19th *February* 1763, by Mr. *William Gordon* ſolicitor at *London*, in name of the petitioner, he returned for anſwer, " That he would moſt readily conſider any " application that ſhould be made to him after the Houſe " of Lords ſhould have given judgment upon the two ap- " peals; *but that*, at preſent, he could take no reſolution." The judgment of the Houſe of Lords, whereby it was determined, that the court of ſeſſion was not competent to try the crimes of bribery and corruption, was not pronounced till the 14th *March*. It was *only four* days thereafter, that a ſecond application was made to the Lord Advocate; to which he returned the anſwer above recited, delaying the matter in effect, *till* he ſhould return to *Scotland;* and no ſooner was he arrived in *Edinburgh*, than Mr. *John Hay* writer, by virtue of a written mandate from the petitioner, preſented to his Lordſhip a written information, ſigned by the petitioner, the ſubſtance of which is above ſet forth. To this repreſentation and requiſition, his Lordſhip returned the anſwer that has given riſe to this preſent application. From theſe facts, your Lordſhips will be enabled to judge, whether the petitioner had made any unneceſſary delays in endeavouring to bring on a trial; and whether the diſtance of time of could afford any rational ground to his Majeſty's Advocate for refuſing to comply with his demand.

With regard to the offer which is made by his Lordſhip, of granting his *concourſe* to any criminal libel brought by a party having intereſt to purſue, the petitioner can regard it *in no other* light, than as an *abſolute denial* of the aſſiſtance of his

his office, in the *only* ſhape in which it could be effectual to the petitioner to inſure a trial. His Lordſhip well knew, that in the former proceedings before the court of ſeſſion, one of the ſtrongeſt defences inſiſted upon for the defenders, was the want of a proper title in the purſuers to carry on any ſuch action at their *inſtance*, with the *concourſe* only of the King's Advocate. It was then ſtrenuouſly maintained, that bribery was properly a *publick crime*, by which no private perſon was directly injured; and conſequently, that it could be proſecuted *ad vindictam publicam*, at the inſtance of *no* perſon whatever, except his Majeſty's Advocate: The petitioner, therefore, was well aware, that had he gone on, in conſequence of this offer, to raiſe criminal letters at his own inſtance, the defenders would not have failed to object in like manner, to his want of a proper title; a defect which the concourſe of the King's Advocate, granted *ex officio*, would not have been held ſufficient to ſupply. This would moſt infallibly either have caſt the proceſs altogether; or, at leaſt, have led into a long and tedious litigation; and conſequently, inſtead of bringing on a ſpeedy and effectual trial, the offer made by his Majeſty's Advocate, of granting his concourſe, would have only ſerved to have put it off to a greater diſtance, and to have involved the detectors of the bribery in a multiplied and heavy expence.

Your Lordſhips will alſo obſerve, that this offer of concourſe is not made to Sir *John Gordon nominatim*, but to any perſon having intereſt; ſo that it remained a matter extremely doubtful, whether his Lordſhip meant ever to grant this concourſe to your petitioner, *or* whether he would conſider him, as having ſuch an intereſt as to intitle him to the benefit of that concourſe, which his Lordſhip thereby *ſeemed* to offer.

However, before proceeding any farther, your petitioner was willing to obtain ſome farther explanation from the the Lord Advocate. In this view the petitioner wrote to Mr.

Mr. *Hay* of this date, deſiring him once more to wait upon the Lord Advocate, and make the following requiſition of his Lordſhip. " I want to know whether he will, as " Lord Advocate, concur as a proſecutor with me in criminal letters to be raiſed againſt Colonel *John Scott* and others, for bribery at the *Dingwall* elections? Or, 2*do*, " If the Lord Advocate declines concurring as a proſecutor, " will his Lordſhip adhibit his concourſe at my inſtance " ſolely? and does his Lordſhip underſtand, that by giving " ſuch concourſe to me, he gives it to a perſon having a " proper title and intereſt to carry on the foreſaid proſecution? His Lordſhip is intreated to explain what is " meant by the concourſe he offers, and what benefit Sir " *John* derives from it." July 4. 1764.

To this laſt requſition, his Lordſhip made anſwer *verbally*, " That he had already ſignified his reſolution in writing: That Sir *John*'s own lawyers could explain to him " what was the meaning of the Lord Advocate's concourſe, " and what the effect of it would be in the preſent caſe."

As this anſwer therefore, has proved equally unſatisfactory with any of the former, the petitioner thinks it *his* duty *ſtill to inſiſt*, that this matter ought to be brought to a trial before the ſupreme criminal court of this country. He ſhould indeed be extremely ſorry, if, after all his honeſt endeavours to check this growing abuſe, ſo dangerous to the liberties and happy conſtitution of this country, he ſhould only have ſerved to *fix* down a *precedent* to be remembered in all future elections, *that* a candidate need give himſelf very little trouble about the legality of the methods which he ſhall employ to compaſs his purpoſe. Let him go on to violate all the moſt eſtabliſhed laws with regard to elections. Let him ſcatter bribery and corruption amongſt the electors with the moſt liberal hand. Let theſe offences be afterwards detected, and ſuch detection even ſtand upon record in the ſupreme civil courts of the united kingdoms; yet, there is

ſtill a chance, that he ſhall remain unpuniſhed, and be able to ſet at defiance all the efforts of law and publick virtue.

The petitioner apprehends, that altho' by the eſtabliſhed forms of criminal procedure in this country, no proſecution can be carried on without the intervention of his Majeſty's Advocate, either proſecuting at his own inſtance, or concurring in the proſecution of a private party: Yet, wherever a relevant information is exhibited to his Lordſhip by any private perſon, where ſufficient evidence is offered of the facts contained in that information, and the proſecution offered to be carried on without any expence to the publick, his Lordſhip cannot arbitrarily with-hold the aſſiſtance of his office, in either of theſe ſhapes, according as the nature of the offence ſhall demand: And that if he does ſo, without ſufficient reaſon, it is competent to your Lordſhips, as being the ſupreme Judges in all criminal matters, to interpoſe your authority. It is with this view, that the preſent application is now made to your Lordſhips, that you may interpoſe your authority *effectually*, ſo as to prevent a criminal action of ſo general and conſtitutional a nature, from being eluded, merely by the King's Advocate's with-holding his inſtance, which the petitioner apprehends he is in *duty* bound to give.

If it is law, that his Majeſty's Advocate, upon a *pointed* information of a crime given in to him by a private party, who not only condeſcends upon proper evidence, but likewiſe offers to be at the whole charge of the proſecution, may, nevertheleſs, by a ſimple *nolumus*, prevent that proſecution altogether; the petitioner muſt be forgiven to ſay, that in point of police and publick juſtice, the conſtitution of this country, ſo happy in other reſpects, is *miſerably defective*. Cuſtom, during a long period of years, ſeems to have eſtabliſhed it as law, that the title to purſue in proſecutions for crimes of a publick nature, is veſted in this part of the united kingdom, in his Majeſty's Advocate; and the

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petitioner can scarce doubt that ſuch is the law, after the opinions he has received on that ſubject, and what he has heard advanced, both at the bar of the court of ſeſſion, and in the Houſe of Lords, in the courſe of the proceedings, which were the conſequence of the *Dingwall* elections in the year 1758: Certain, however, he is, that if ſuch a title is veſted in others, it is to be exerciſed with the utmoſt difficulty, and being liable to many objections, muſt be vindicated by a tedious and expenſive litigation. But ſuch being the law or practice, it becomes a queſtion of the utmoſt importance to this country, how that title to proſecute for publick offences, which is veſted in his Majeſty's Advocate, may be uſed.

The laws of both parts of the united kingdom have *long* denied a diſpenſing power to the crown. In *Scotland*, the claim of right is explicit in declaring, that to aſſert an abſolute power to caſs, annul and diſable laws, is contrary to law: Yet, if the King's Advocate, while he poſſeſſes the *title* to purſue in crimes of a publick nature, may refuſe his inſtance, while a pointed information is exhibited to him of ſuch a crime, ſuch an abſolute power of diſabling laws, does actually exiſt in that officer, tho' diſclaimed in the moſt general terms in the claim of right.

The petitioner, therefore, cannot permit himſelf to ſuppoſe, that his Majeſty's Advocate can refuſe his inſtance in ſuch a caſe; at leaſt, if he does refuſe it, he apprehends it muſt be on a cauſe aſſigned, and that the propriety of ſuch cauſe is ſomewhere cognizable by legal procedure, and he can ſuppoſe it cognizable no where elſe, but in that court, which is competent to try the action itſelf, where ſuch inſtance is demanded; for he underſtands it to be a moſt general principle, that where a juriſdiction reſides, every power neceſſary for explicating that juriſdiction reſides alſo, according to the opinion of *Javolenus*, *l.* 2. *ff. De juriſdictione*, "Cui juriſdictio data eſt, ea quoque conceſſa videntur, ſine "quibus juriſdictio explicari non potuit."

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Accordingly, your petitioner is informed, that it is not without precedent in this country for a court of juſtice *to* interpoſe in determining the propriety of the conduct of his Majeſty's Advocate in the exerciſe of his office, and where he has refuſed to lend his official aid, when required, on juſt cauſe, *to* compel him to give that aid. Thus, in the court of ſeſſion, Sir *Thomas Hope*, while King's Advocate, having refuſed to ſubſcribe two bills of improbation at the inſtance of the Earl of *Abercorn*, and *James Inglis* of *Inglistoun*, (tho' he aſſigned a cauſe for his refuſal, *viz.* that the King had an intereſt to defend in thoſe very actions) was ordained to ſubſcribe the bills. Nor did the court reſt ſatisfied with determining this particular caſe, but made a general order concerning the duty of the King's Advocate in all ſimilar caſes, by their act of ſederunt, of date the laſt of *January* 1633; and this precedent is the more remarkable, that it happened at a time when matters of prerogative, and the powers devolved by the commiſſion of the crown on all its ſervants, were carried farther, and inſiſted on more ſtrenuouſly than they can be in latter times, ſince they have been better aſcertained.

Your Lordſhips, therefore, as the ſupreme Judges Ordinary in criminal matters within this part of the united kingdom, and, of conſequence, judges competent to all crimes of whatever denomination committed in *Scotland*, muſt poſſeſs the ſame power with reſpect to criminal actions, that the court of ſeſſion poſſeſs with reſpect to actions competent before them; and his Majeſty's Advocate muſt of conſequence be amenable in this court, with reſpect to his conduct concerning the exerciſe of his official inſtance in actions of a criminal nature. If he has improperly refuſed that inſtance, when required openly and in a legal form to give it, your Lordſhips will ordain him to iſſue an indictment, or to ſubſcribe a bill for criminal letters, in the ſame way

way as the court of ſeſſion ordained Sir *Thomas Hope* to ſubſcribe bills of improbation; and if he ſhall alledge, that he had cauſe for refuſing his inſtance, your Lordſhips will ordain him to ſhow ſuch cauſe, and judge of the validity of it when ſhown.

Unleſs ſuch a power reſides in your Lordſhips, the office of his Majeſty's advocate is of the *moſt dangerous* nature to the conſtitution, and may be a mean of ſubverting many of the moſt valuable laws, and moſt excellent regulations, with reſpect to police and publick juſtice, this nation is poſſeſſed of, and which our anceſtors were at the utmoſt pains to provide. They denied to the crown a power of diſabling laws; but that power may, by means of this officer, be indirectly exerciſed: And tho' they allowed to the King the prerogative of mercy in pardoning criminals; yet the exerciſe of that prerogative, they laid under ſuch reſtrictions, that it never could prove diſadvantageous, or totally interrupt the courſe of publick juſtice. Thus, in ſome caſes, that prerogative could not be exerciſed at all, as in act 1563, *cap.* 62. and in act 1540, *cap.* 118. And in no caſe could the benefit of a pardon be claimed, without a direct acknowledgment of the crime; and even then it was ineffectual, till an aſſythment to the private party was either paid, or caution found for it. Nor, in any of theſe caſes, could the remiſſion take off the infamy, if the crime was a *crimen infamans*, and inferred an *infamia juris*, and incapacity of publick office; but if the King's Advocate may thus indirectly pardon, by refuſing his inſtance to a proſecution, all theſe ſalutary laws are eluded, the groſſeſt crimes may for ever remain unpuniſhed, private parties can have no claim for an aſſythment, and the criminal may eſcape without even incurring that infamy which the law has indelibly affixed to thoſe who are guilty of groſs tranſgreſſions.

Even in crimes where there is a private party having a title to purſue, with concourſe only of the King's Advo-

cate, which is never refuſed to any one; yet the privilege claimed by the King's Advocate, of arbitrarily refuſing to purſue at his own inſtance, without aſſigning any ſufficient reaſon, and without allowing his conduct, in ſo doing, to be cognizable by any court, might be attended with very ſerious conſequences. The crime to be tried may often be of an occult nature, and the private party intitled to purſue, perhaps himſelf, the moſt material evidence. In ſuch a caſe as this, the refuſal of the King's Advocate to purſue at his own inſtance, would not, indeed, have the effect, as in publick crimes, of preventing a trial altogether; but it would very poſſibly have an effect a great deal worſe, that of ſtifling the evidence, and thereby ſecuring impunity to the offender.

Such being the conſequences of the power ſuppoſed by his Majeſty's Advocate to be inherent in his office: The matter ſeems to deſerve the moſt ſerious attention of your Lordſhips, and of the country in general; nor could the petitioner, as a native of this country, and a well-wiſher to its conſtitution, (had his direct intereſt in the matter in iſſue been ſmaller than it is) have omitted to bring it to trial, without accuſing himſelf of ſome neglect, in not endeavouring to aſcertain, during theſe times of liberty and publick tranquillity, a point which might prove of the utmoſt importance in precedent, if, in ſome future period, as in paſt times has happened, a blow ſhould be aimed at the publick liberty, or the perſonal ſecurity of the ſubject.

The petitioner is aware, that he may be blamed for not bringing this matter ſooner to trial; but ſome of the reaſons of delay have already been explained: A variety of other obſtructions have, from time to time, occurred, which have retarded this application to your Lordſhips. The petitioner would have reckoned it extremely fortunate, if he could, by that means, have removed the neceſſity of making any ſuch application at all. Perhaps the delay might have been

been ſtill greater, had he not been *rouſed* to inſiſt, from ſeeing, that ſuch offences were becoming more prevalent, from the proſpect of impunity; and that from thoſe already committed not being brought to trial, he was *likely ſtill farther* to ſuffer, from a repetition of the ſame offence.

Upon the whole, he does humbly contend, that it was the duty of his Majeſty's Advocate, to have given his inſtance to a criminal proſecution, on account of the bribery and corruption practiſed in the courſe of the *Dingwall* elections in the year 1758; and that, having refuſed to do ſo, he ought to be ordained by your Lordſhips, either to iſſue a proper indictment, or ſubſcribe a bill for criminal letters, for bringing that offence to trial.

May it therefore pleaſe your Lordſhips to appoint this petition to be ſerved on his Majeſty's Advocate, and him to give anſwers thereto, on ſuch notice as may ſeem proper; to find that he has done wrong, in refuſing his inſtance to the proſecution demanded, and, in conſequence thereof, to make ſuch order as to your Lordſhips ſhall ſeem juſt.

According to Juſtice, *&c.*

ILAY CAMPBELL.

ANDREW CROSBIE.

ROBERT BLAIR.

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